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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DARRELL BEAULIEU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court committed plain error by relying in part for purposes of sentencing on testimony given at the trial of petitioner's co-conspirators.

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OCTOBER TERM, 1989

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 893 F.2d 1177.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1990. A petition for rehearing was denied on February 28, 1990. The petition for a writ of certiorari was filed on April 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following his guilty plea in the United States District Court for the Western District of Oklahoma, petitioner was convicted of conspiring to manufacture amphetamine (Count 1), and attempting to manufacture amphetamine (Count 2), both in violation of 21 U.S.C. 864.[1/] The district court sentenced petitioner under the Sentencing Guidelines to concurrent terms of 98 months' imprisonment on each count, to be followed by a five-year period of supervised release. The court of appeals affirmed.

1. As explained in the presentence investigation report (PSI) prepared by the probation office, from November 1985 through May 1988 petitioner directed several persons in a conspiracy that manufactured more than 12 pounds of amphetamine. Petitioner solicited the assistance of his co-conspirators to purchase chemicals and glassware, to act as lookouts, and to manufacture the drug. The persons who manufactured the drug included petitioner, his brothers Ronald and John Beaulieu,[2/] Clint Bowen, Terry Bowen, and Russell Allen, while Regina Chester and Virginia McNeill purchased the chemicals needed to manufac-

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1/ Pursuant to the plea agreement, the government dismissed two additional counts of manufacturing amphetamine, in violation of 21 U.S.C. 841(a)(1) (Counts 6 and 7), and one count of using a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Count 8). Pet. 5.

2/ Petitioner's brothers were named in the same indictment as petitioner. After being separately tried and convicted, they were sentenced in the same proceeding as petitioner. Gov't C.A. Br. 2.

ture the amphetamine. Over the life of the conspiracy, petitioner and his associates purchased chemicals and supplies on 24 occasions from the Mid-America Chemical Company in Oklahoma City, Oklahoma. See Pet. App. 3; Gov't C.A. Br. 4-5. On the basis of petitioner's admission that he had played a leadership role in the offense, the PSI concluded that his offense level should be increased by four levels under Guidelines § 3B1.1(a).[3/] Gov't C.A. Br. 6.

2. At sentencing, petitioner challenged the conclusion in the PSI that he was a leader or organizer of the amphetamine manufacturing operation (and was thus subject to a four-level increase in his offense level). He argued that he was at most a manager or supervisor (and was thus subject to only a three-level increase in his offense level). It was petitioner's submission that Russell Allen was the organizer or leader of the operation.

3/ In relevant part, Guidelines § 3B1.1 provides:

Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

See Pet. 6.[4] Nevertheless, during his testimony petitioner admitted that he continued to manufacture amphetamine after Allen's arrest; that Regina Chester assisted him, and he had sent her to purchase chemicals approximately five times; that he had sent Clint Bowen to purchase chemicals eight to ten times; that he had sent Ronald Beaulieu to purchase chemicals; and that he was the "cook," i.e., the chemist, in the amphetamine manufacturing operation. Gov't C.A. Br. 5.[5]

The district judge who sentenced petitioner had presided at the trial of petitioner's brothers. Pet. App. 3 n.2. At that trial, Russell Allen had testified that he was a member of the organization, that he worked mainly with petitioner, whom he knew as "Pete," and that the amphetamine 'cooks" took place at petitioner's house. Regina Chester, Clint Bowen, and Virginia McNeill had testified that they belonged to the organization, and that petitioner was in charge. Terry Bowen, Clint Bowen's brother, had testified that he was a member of the organization, that petitioner directed him to obtain a chemical component of

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4/ Petitioner's 98-month sentence fell in the middle of the guideline range for petitioner if the four-level enhancement was correct. The one-level reduction petitioner sought would have resulted in a guideline range of 78-97 months.

5/ Petitioner conceded that the criminal activity involved five or more participants or was otherwise extensive. Pet. App. 3 n.1.

amphetamine from Ronald Beaulieu, and that he had turned over to petitioner the chemicals he had purchased. Gov't C.A. Br. 4-5.[6] With petitioner's acquiesence, the district court relied on that testimony at sentencing in petitioner's case.[7] Based in part on that testimony, the court found that petitioner was an organizer or leader of the amphetamine manufacturing operation and, pursuant to Sentencing Guidelines § 3B1.1(a), added four points to his base offense level. Pet. App. 2-3; Gov't C.A. Br. 5.

2. The court of appeals affirmed. Pet. App. 1-11. Noting that historically a district court could use any reliable source of information in fixing an appropriate sentence, the court held that neither the Constitution, the Criminal Code, nor the Sentencing Guidelines prohibit a sentencing judge from relying on testimony given at the trial of another person in sentencing a

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6/ Allen, Chester, McNeill, and both of the Bowens testified pursuant to plea agreements with the government. Gov't C.A. Br. 4.

7/ At sentencing, the court had discussed with petitioner's counsel the propriety of relying on the testimony at the brothers' trial (Tr. 60):

> The Court: It's my view, based on the evidence at trial, which I think the law establishes I can consider -- is there any quarrel with that since your client was not a defendant at trial?
>
> [Petitioner's counsel]: I don't have any problem with it. I think the Court can consider it.
>
> The Court: I think I can, too, particularly in light of the one statute that doesn't limit the amount and the type of information I can consider. But I heard an awful lot of testimony about [petitioner] at trial. And in my view, the probation report accurately characterizes his role in the offense. And that adjustment is appropriate in my view.

defendant. Id. at 4-7. The court also held that the evidence on which the district court in this case relied was sufficiently trustworthy to be considered, and in fact was corroborated by petitioner's own admissions at sentencing. Id. at 9.

ARGUMENT

Petitioner claims that he was denied due process of law when the district court, relying in part on testimony given at the trial of his co-conspirator brothers, found at sentencing that he was an organizer or leader of a criminal activity involving five or more participants, rather than a manager or supervisor, as he asserted. That claim does not warrant review by this Court, for several reasons.

1. Petitioner has not preserved his claim because he did not object at the sentencing hearing to the district court's reliance on the evidence from his brothers' trial.[8/] In fact, in response to an inquiry from the district court whether the court could consider that evidence, defense counsel said that "I don't have any problem with it. I think the Court can consider it." Tr. 60. Under these circumstances, petitioner has waived his claim in the absence of plain error. Fed. R. Crim. P. 52(b). But plain error can be found "solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 n.14 (1982)). Because petitioner does

8/ Petitioner also did not raise this claim in his brief in the court of appeals. See Principal Br. of Defendant-Appellant 1, 5-9.

not contend that the evidence was inaccurate or unreliable, he cannot establish that it was plain error for the district court to rely on it.

Although the court of appeals noted that petitioner had failed to object to the district court's consideration of this evidence, the court of appeals declined to rule that petitioner had waived the issue. The court excused petitioner's failure to object on the ground that at the time of petitioner's sentencing, the Eleventh Circuit had not yet decided United States v. Castellanos, 882 F.2d 474 (1989), a case supportive of petitioner's claim. Pet. App. 3 n.3. But the other decision on which petitioner relies, Specht v. Patterson, 386 U.S. 605 (1967), was decided more than two decades prior to his sentencing hearing. Accordingly, petitioner had the tools to make his objection at sentencing, and cannot now excuse that default on the ground that at the time of his sentencing no court of appeals had adopted the argument he now raises. See Reed v. Ross, 468 U.S. 1 (1984).

2. The decision below is correct. It is well settled that at sentencing a district court has wide discretion to determine what information to consider and what weight to give to it. As this Court has explained, a sentencing judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 446 (1972). The Federal Rules of Evidence are expressly made inapplicable to sentencing hearings. Fed. R. Evid. 1101(d)(3). Moreover, under

the Sentencing Reform Act of 1984, 18 U.S.C. 3551-3742 and 28 U.S.C. 991-998, all reliable evidence is admissible at sentencing. The Act specifically provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. Under the former version of Section 3661, as Congress was aware, S. Rep. No. 307, 97th Cong., 1st Sess. 1219-1220 (1984), the courts had consistently held that even illegally obtained evidence and hearsay (if reliable) could be considered at sentencing. See United States v. Roberts, 445 U.S. 552, 556 (1980); United States v. Reme, 738 F.2d 1156, 1167 (11th Cir. 1984), cert. denied, 471 U.S. 1104 (1985); United States v. Lee, 540 F.2d 1250 (4th Cir.), cert. denied, 429 U.S. 894 (1976).9/

The Sentencing Guidelines embrace those principles. Section 6A1.3 of the Guidelines provides that a district court can consider any reliable evidence, including hearsay, at sentencing. Guidelines § 6A1.3 (Policy Statement).10/ If there is

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9/ In determining the appropriate sentence for a particular defendant, the sentencing judge may even consider evidence of crimes for which that defendant has not been convicted. Williams v. New York, 337 U.S. 241, 244 (1949).

10/ Section 6A1.3 (Policy Statement) of the Guidelines provides that:

> (a) * * * In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard
>
> (continued...)

a question about the reliability of the information available to the court, the Guidelines endorse the practice of conducting an evidentiary hearing to resolve that question. Ibid. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). But once the reliability of that information has been established, the court may use it to determine the appropriate punishment. United States v. Silverman, 889 F.2d 1531, 1535 (6th Cir. 1989); United States v. Sciarrino, 884 F.2d 95 (3d Cir.), cert. denied, 110 S. Ct. 553 (1989); see also United States v. Roberts, 881 F.2d 95, 105-106 (4th Cir. 1989).

At the same time, it is also settled that a court may not rely on "misinformation of a constitutional magnitude" at sentencing. United States v. Tucker, 404 U.S. at 447. But petitioner does not claim that the information on which the district court relied was inaccurate. Instead, he claims that he did not have the opportunity to cross-examine the declarants, and therefore in essence raises a Confrontation Clause claim. The admission of hearsay, however, does not violate the Confrontation Clause if the evidence has sufficient "indicia of reliability" despite the lack of opportunity for cross-examination. See Cruz v. New York, 481 U.S. 186, 194 (1987); Lee v. Illinois, 476 U.S.

10/ (...continued)
> to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

The accompanying Commentary expressly states that "[r]eliable hearsay evidence may be considered." Guidelines p. 6.2.

530, 543-544 (1986). Accordingly, petitioner errs in claiming that there should be a per se rule forbiding a sentencing court from relying on hearsay evidence at sentencing.

In this case, the court of appeals correctly found that the testimony on which the district court relied at sentencing had "sufficient indicia of reliability to support its probable accuracy," Guidelines § 6A1.3(a). Pet. App. 9. Five witnesses at the trial of petitioner's brothers identified petitioner as the leader and organizer of the amphetamine manufacturing operation. Physical and documentary evidence introduced at the Beaulieu brothers' trial corroborated that testimony, as did petitioner's own admissions at the sentencing hearing in this case. Pursuant to Fed. R. Crim. P. 32(c)(3)(A) and (D), petitioner had notice of the PSI's conclusion that he was an organizer and leader of the criminal activity, and petitioner had an opportunity at the sentencing hearing to rebut that conclusion. Accordingly, the requirements of due process were satisfied. See United States v. Sciarrino, 884 F.2d at 97; United States v. Sunrhodes, 831 F.2d 1537, 1542 (10th Cir. 1987). Unfortunately for petitioner, his testimony at the sentencing hearing confirmed, rather than rebutted, both the PSI's conclusion and the reliability of the testimony at his brothers' trial. Under these circumstances, the court of appeals properly concluded that the district court did not err when it considered the testimony from the trial of petitioner's brothers.

3. Petitioner claims that the decision below conflicts with the Eleventh Circuit's decision in United States v. Castellanos, supra. Castellanos held that evidence at a separate trial could not be considered at a sentencing proceeding on the issue of the amount of narcotics the defendant possessed. The Eleventh Circuit reached that conclusion on the ground that the defendant had not had the opportunity to cross-examine witnesses, make objections, or put on evidence at the other trial. 882 F.2d at 477 & n.3.

We submit that the Eleventh Circuit's analysis is wrong. It would appear to foreclose reliance by a sentencing court not only on evidence introduced at another trial, but also on all forms of hearsay, a result that it seems unlikely the Eleventh Circuit intended. That approach would be inconsistent with 18 U.S.C. 3661, with the Federal Rules of Evidence, and with Section 6A1.3 of the Sentencing Guidelines, and it is not required by the Confrontation Clause. The Eleventh Circuit decided the evidentiary question in Castellanos without the benefit of briefing on the issue, and it did not consider the effect of 18 U.S.C. 3661, Fed. R. Evid. 1101(d)(3), Sentencing Guidelines § 6A1.3, or this Court's Confrontation Clause decisions. Until the Eleventh Circuit has the opportunity to consider the effect of these authorities on the position it took in Castellanos, it is not entirely clear that that court will adhere to the views it expressed in that case.

In any event, defense counsel in this case acquiesced in the district court's reliance on the evidence from petitioner's brothers' trial. Although the court of appeals reached the merits and did not rely on waiver principles in this case, the explicit waiver by counsel is sufficient to distinguish this case from Castellanos and makes it unnecessary for this Court to address the conflict in reasoning between the two cases. Moreover, in Castellanos after the evidence from the separate trial had been excluded, the only evidence remaining before the district court was the defendant's stipulation in his plea agreement, and that evidence did not support the sentence imposed. 882 F.2d at 477. In this case, by contrast, even if the testimony from the trial of petitioner's brothers had been excluded, petitioner's own testimony at the sentencing hearing, including his admission that he had continued to manufacture amphetamine after Russell Allen's arrest, provided an independent basis for the district court's determination that petitioner was the organizer or leader of the amphetamine manufacturing organization.11/

11/ Specht v. Patterson, supra, on which petitioner also relies, Pet. 9, is inapposite. In Specht, the Colorado Sex Offenders Act permitted a defendant to be sentenced to an indeterminate term of one day to life without notice or a full hearing. By contrast, petitioner enjoyed a panoply of procedural safeguards, including notice, a hearing, the assistance of counsel, and the opportunity to present favorable evidence and to rebut adverse evidence. Moreover, Specht specifically adhered, 386 U.S. at 608, to Williams v. New York, 337 U.S. at 245, 249-250, which held that due process did not prohibit a sentencing judge from considering information gathered from witnesses whom the defendant had neither confronted nor cross-examined.
(continued...)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

THOMAS M. GANNON
Attorney

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11/ (...continued)
Finally, since Specht the Court has made clear that the Confrontation Clause does not exclude all hearsay evidence. See Cruz, 481 U.S. at 194; Lee, 476 U.S. at 543-544.

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UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by mail on June 4, 1990.

SUSAN M. OTTO
Suite 524
215 Dean A. McGee Ave.
Oklahoma City, OK 73102

Kenneth W. Starr

KENNETH W. STARR
SOLICITOR GENERAL

DOJ

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